

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

74-2637

B
P/S

To be argued by
ARTHUR N. FIELD

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

STANLEY SILVER,

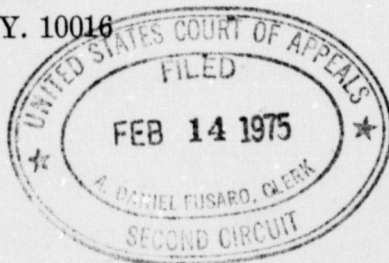
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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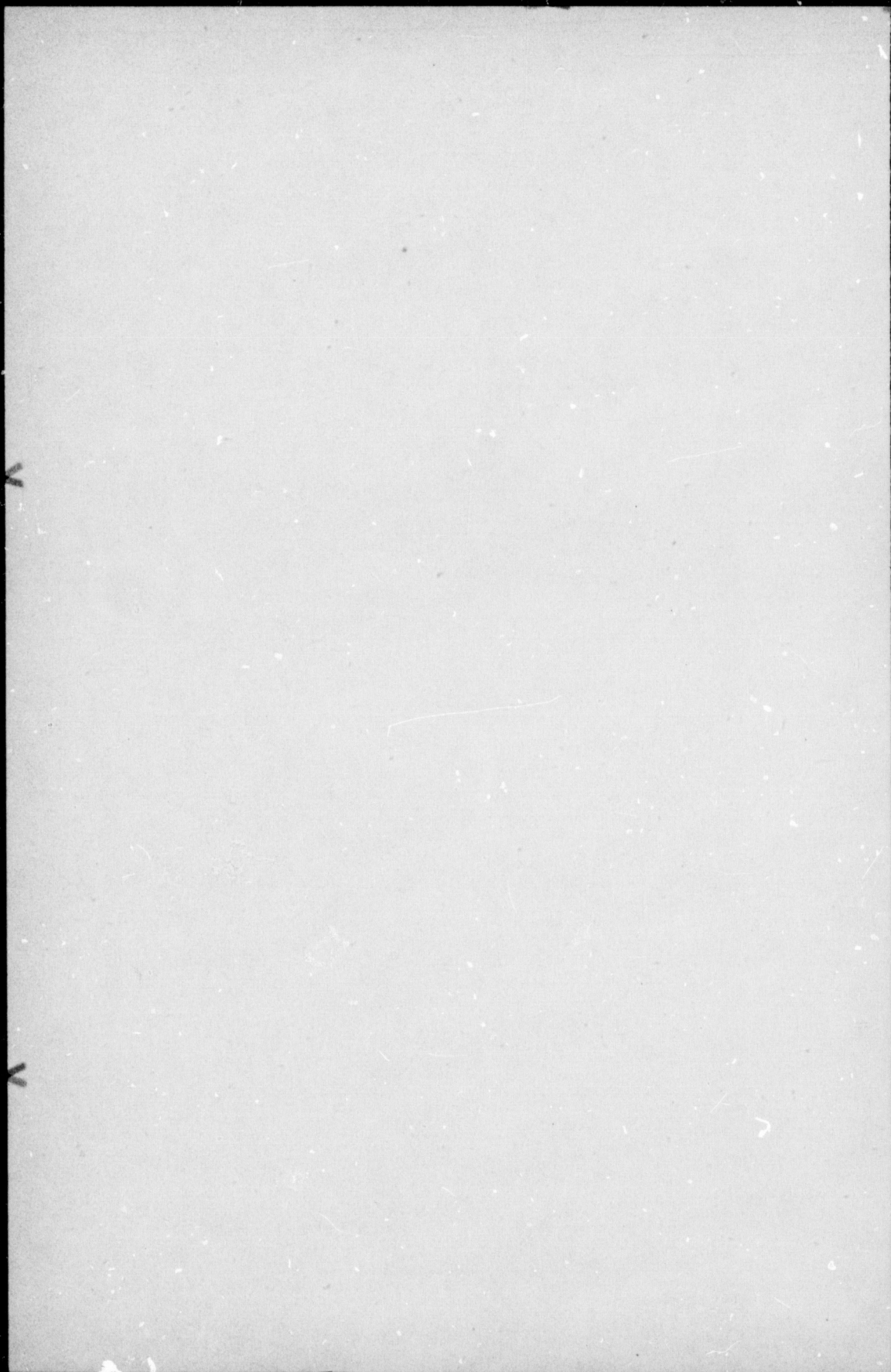


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
The Issues	1
The Facts	3
Opinion of Hon. John R. Bartels, D.J.	6
The False Claims Act (31 U.S.C. §231)	7
POINT I	
The acts of the defendant do not constitute a viola- tion of the False Claims Act	8
CONCLUSION	17

CASES CITED

<i>Hyslop v. United States</i> , 261 F.2d 786 (8th Cir. 1958)	13
<i>United States v. Cochran</i> , 235 F.2d 131 (5th Cir. 1956)	15
<i>United States v. Farina</i> , 153 F. Supp. 819 (D.N.J. 1957)	12
<i>United States v. Fowler</i> , 282 F. Supp. 1 (E.D.N.Y. 1968)	13
<i>United States v. Hess</i> , 63 Sup. Ct. Rep. 379, 317 U.S. 537	12
<i>United States v. Howell</i> , 318 F.2d 162 (9th Cir. 1963)	14

	PAGE
<i>United States v. Marple Community Record, Inc.</i> , 335	
F. Supp. 95 (E.D. Pa. 1971)	10
<i>United States v. McNinch</i> , 78 Sup. Ct. Rep. 950, 356	
U.S. 595	9, 11, 12
<i>Woodbury v. United States</i> , 232 F. Supp. 49 (D. Oregon	
1964)	14

STATUTES CITED

False Claims Act, 31 U.S.C. §§231-235	1, 7, 8
Rule 56 of the Federal Rules of Civil Procedure, 28	
U.S.C.	3
Chapter XI, 11 U.S.C. §§701 <i>et seq.</i>	3
18 U.S.C. §2	5, 6
18 U.S.C. §152	5
18 U.S.C. §495	5

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STANLEY SILVER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

Preliminary Statement

The defendant appeals from the final judgment entered in this action in the United States District Court, Eastern District of New York, on the 30th day of October, 1974 (Bartels, J.) wherein the plaintiff was awarded judgment against the defendant in the sum of \$24,000.00, plus costs and interest.

The Issues

The action was brought to recover double damages and forfeitures under the False Claims Act, Title 31, U.S.C. §§231-235.

The complaint alleges that Intertech Industries, Inc. held two contracts with the United States; that various sums of

money were due from the United States for work actually done and materials supplied; that Intertech Industries, Inc. executed an assignment of the proceeds of the contracts to two banks representing two subcontractors; that the plaintiff, as President of Intertech Industries, Inc. caused a forged or altered letter to be presented to the United States which purportedly authorized the defendant to receive payments under the contracts; that upon receiving the checks which were made payable to the two banks, the defendant forged the signature of the banks and caused the same to be presented for payment to the account of Intertech Industries, Inc.

It was the contention of the defendant that the acts complained of did not constitute a violation of the False Claims Act because (1) the checks were not the type of claims contemplated by Congress in enacting the Statute, (2) the checks were valid ones issued to a proper payee for debts actually owed by the Government and (3) no damages were sustained by the United States.

All of the facts relating to this case were conceded and it was thereupon determined by the plaintiff and defendant to present the issue to the Court for a determination as a matter of law. Accordingly, the plaintiff moved for summary judgment and the defendant, in his turn, made a cross-motion for summary judgment.

Although the complaint demanded judgment against the defendant for twice the damages sustained by the plaintiff, it abandoned this claim and restricted its application for judgment to the sum of \$24,000.00, representing one \$2,000 00 statutory forfeiture for each forged check.

On October 22, 1974 Hon. John R. Bartels, D.J., after argument on the motions, issued an order granting plaintiff's motion for summary judgment and denying the defendant's cross-motion for summary judgment.

It is our contention that the order appealed from is improper in that it incorrectly decided that there had been a violation of the False Claims Act.

The Facts

As previously indicated, there is no dispute concerning the essential facts of this case. The District Court, in its opinion, set forth a statement of the facts which the appellant adopts for the purpose of this appeal. The Court's statement is as follows:

"This action was brought by the United States, pursuant to 31 U.S.C. §232, to recover statutory forfeitures under the False Claims Act, 31 U.S.C. §§231-235. The parties have stipulated all material facts and both now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U.S.C. The facts are, briefly, as follows: The defendant Stanley Silver was president of Intertech Industries, Inc. ('Intertech'), a manufacturer which supplied ordnance replacement parts to the Armed Forces of the United States pursuant to several Government contracts. Intertech held the prime contracts but employed subcontractors for the two contracts involved in this action. In January, 1970, Intertech filed a petition in bankruptcy under Chapter XI, 11 U.S.C. §§701 *et seq.*, and continued operations but in order to assure payment to the subcontractors and thereby secure their continued

work on the contracts, it assigned the proceeds of each contract with the Government to a separate bank in each case, which would distribute the progress payments, received from the Government, between the subcontractors and Intertech. The subcontractors were entitled to 52% of these proceeds and Intertech was entitled to 48% thereof.

Because this arrangement caused delay in the ultimate receipt of the proceeds by the subcontractors and Intertech, each bank provided Intertech with a letter of authorization to pick up the next progress payment check due, made payable to each bank, directly from the Government, thereby eliminating the mailing time from the Government to the banks. Thereafter Silver, without authority, photostated these original letters and collected from the Government the remaining progress payment checks by changing only the date on each letter, but failed to deliver the same to the banks. Twelve Treasury checks, totalling \$117,768.87, were obtained by Silver in this manner. Upon receipt of each check, Silver forged the endorsement of an officer of the payee-bank and deposited the check into an Intertech account at a different bank. Through normal banking channels, the checks were presented to and honored by the United States Treasury and the proceeds were credited to the Intertech account. Although the subcontractors were not paid their share of the checks at that time, they were ultimately made whole by Silver. Consequently, it is conceded that the United States suffered no actual damages as a result of the defendant's actions.

The Government charges that the defendant's actions violated the False Claims Act and accordingly seeks, pursuant to 31 U.S.C. §231, \$2,000 for each of the twelve checks with forged endorsements" (75a-82a).

It becomes necessary, at this point, to set forth certain additional conceded facts which were omitted from the Court's recital.

Every requisition for payment made to DCASR was legitimate and valid. Every such requisition was for work actually performed and parts delivered to the United States of America. The United States of America makes no claim that it ever paid a single penny to Intertech which was not justified by the work performed and materials furnished. There is no claim that any invoices were forged or false or misstated. The Government issued its checks for full value received.

It has been conceded by the United States of America that it suffered no loss by reason of the acts of the defendant herein. It is further conceded by the plaintiff that it was not deprived of any monies by reasons of any false, fictitious or fraudulent claims filed or made by the defendant. It has been further conceded that no claim has been made against the plaintiff by either the First National Bank of Toledo or the Home National Bank and Trust Co. or, for that matter, by the subcontractors.

In any event, when the fraudulent acts of the defendant came to light, Intertech ceased its business operations. On August 19, 1972, defendant was indicted on twelve counts of violating Title 18, U.S.C. §495 and §2 for forging the payee's endorsement on and publishing the Treasury checks, and one count of violating Title 18, U.S.C. §152

and §2 for concealing property from creditors and the Referee in Bankruptcy. The defendant pled guilty to one count of forgery. He was sentenced to serve three months in the penitentiary.

Opinion of Hon. John R. Bartels, D.J.

The Court, after reciting the facts as hereinbefore set forth, reviewed the background of the False Claims Act because of the contention of the defendant that the history of the False Claims Act indicated that it was not the purpose or function of the Act to penalize acts of the type committed by the defendant. The Court stated:

"It is apparent that the scope of the Act was not meant to be limited to the narrow one suggested by the defendant of only reaching the particular evil of cheating the Government by means of billing for worthless or non-existent goods or at exorbitant prices. Instead, any actions which have the purpose and effect of causing the Government to immediately pay out money are clearly 'claims' within the purpose of the Act. Several cases clearly indicate that the presentation or causing the presentation of a Treasury check has such purpose and effect. *United States v. Fowler*, 282 F. Supp. 1 (E.D.N.Y. 1968); *United States v. Scolnick*, 219 F. Supp. 408 (D. Mass. 1963), *affirmed*, 331 F.2d 598 (1st Cir. 1964). Therefore, Silver's actions clearly constituted the causing of the presentation of 'claims' against the Government within the Act" (80a).

The Court then considered the contention of the defendant that even if the checks were "claims" within the

meaning of the Act, they were not false, fictitious or fraudulent because each check was validly issued to a proper payee for a debt actually owed by the Government to that payee. The Court found that the act of the defendant was intended to deceive the United States and thus constituted fraud as that term has been defined for the purposes of the Act.

The Court then considered the contention of the defendant that his actions were not within the scope of the Act because the United States suffered no actual damages as a result. The Court held that it was not necessary for the United States to suffer actual damages. The Court concluded:

“Therefore, the defendant’s actions clearly come within the terms of the statute and the United States is entitled to recover the statutory forfeiture even though it has not suffered actual damages” (81a).

The False Claims Act (31 U.S.C. §231)

§231. Liability of persons making false claims

“Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent . . . shall forfeit and pay to the United States the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit”

POINT I

The acts of the defendant do not constitute a violation of the False Claims Act.

This action was brought under the False Claims Act, 31 U.S.C. §231. Under this Act, certain penalties are recoverable from:

"Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious or fraudulent . . ."

As heretofore indicated, it had been arranged that certain subcontractors would have payment guaranteed to them by means of an assignment from Intertech, the prime contractor, of the proceeds due under its contract with the United States Government to certain named banks who were to act as the dispensing agent in distributing such funds in proper amounts to the subcontractor and to Intertech.

When the defendant presented a letter to DCASR for payment due under Intertech's contract with the United States Government, the monies had been earned and were actually due, and the plaintiff herein does not claim otherwise. When DCASR gave its check to the defendant, the check was properly made payable to the order of the proper bank entitled to receive such monies. It is emphasized that the claim was a valid one and the amount paid thereon was proper. Had the defendant at that point delivered the check to the bank who was the payee thereon, it is obvious that that would have been the end of the

matter. What the defendant did, however, was to forge the name of the payee and deposit the check in the account of Intertech. The United States Government was not damaged by this. The United States Government, by this act of the defendant, did not have to pay out a single penny more than it was required to under its contract.

The actual effect of defendant's forgery of the endorsement on the check was to prevent the bank from making proper distribution to the subcontractor. If anyone was defrauded, it was the subcontractor.

It has been conceded that there has been restitution to the subcontractors and they have made no claim upon the Government or anyone else. The banks who were the payees of said checks have made no claims against the Government. The Government itself has not had to pay out one single penny as a result of what the defendant did.

It, therefore, becomes important to ascertain at this time the purpose and intent of the False Claims Act to determine whether the acts committed by the defendant are to be penalized under the Act. (It will be remembered that the defendant was prosecuted criminally for the forgeries and was given a jail sentence.)

In *United States v. McNinch*, 78 Sup. Ct. Rep. 950, 356 U.S. 595, the Supreme Court of the United States was concerned with the applicability of the False Claims Act and it indicated its scope and purpose as follows:

"The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been

billed for non-existent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government."

The Court noted that the manager of the bill in the Senate stated its objective as follows:

"I will simply say to the Senate that this bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and Treasury Department. The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in *obtaining pay from the Government* during the present war; and it is said, and earnestly urged upon our attention, that further legislation is pressingly necessary to prevent *this great evil*; and I suppose there can be no doubt that these complaints are, in the main, well founded. From the attention I have been able to give the subject, I am satisfied that more stringent provisions are required for the purpose of punishing and preventing *these frauds*; and with a view to apply a more speedy and vigorous remedy in *cases of this kind* the present bill has been prepared. (Emphasis added.)"

In *United States v. Marple Community Record, Inc.*, 335 F. Supp. 95 (E.D. Pa. 1971), the Court was confronted with an action under the False Claims Act wherein the defendant had falsely and fraudulently made application for second class mail privileges. The Court, after citing the

McNinch case, *supra*, as having indicated the purpose and intent of Congress in passing the False Claims Act, went on to state:

"This congressional intent which gave birth to the act leads us as it has other courts have to conclude initially 'that the False Claims Act was not designed to reach every kind of fraud practiced on the Government.' *United States v. McNinch*, *supra*, 356 U.S. at p. 595, 78 S. Ct. at p. 953. See also *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963). Rather as is evident, Congress designed the act to be applicable to the particular kind of cheating that was then inhibiting the war effort, namely the practice of certain private persons in fraudulently overcharging the government for goods supplied and services rendered and because the purpose of the act was limited to deterring one kind of cheating, the writers in drafting it 'used language descriptive of this kind of cheating.' *United States v. Tieger*, 234 F.2d 589, at p. 591 n. 6 (3rd Cir. 1956). *Over the years, the Courts have remained remarkably faithful to Congress' intent as expressed in the act and have refrained from applying it to all dealings between the government and private persons in which fraud was present.*" (Emphasis supplied.)

The defendant's acts, when viewed in the light of the intent of Congress in passing the False Claims Act, very clearly do not come within the purview of the Statute. It is not claimed that the defendant had billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered or generally stolen from the Government in the sale of the necessities of war. He did not plunder the public treasury. He did not cheat the Government.

What the defendant did may have constituted fraud but, as stated in the *McNinch* case, *supra*, "it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government."

To similar effect was *United States v. Marple Community Record, Inc.*, 335 F. Supp. 95 (E.D. Pa. 1971). In this case, the Court went on to say:

"In the situation before us, the defendants established the right to send mail at a second class rate. Involved in securing this right was fraud, perhaps, but if so, fraud of a type distinct from that contemplated by the False Claims Act. Plaintiff alleges that the defendants were saving themselves money by fraudulently reducing their rightful obligation to the Post Office *but it does not allege that the defendants were attempting to extract from the United States money or property not rightfully due to them, a concept which appears to be at the heart of the act.*" (Emphasis supplied.)

In *United States v. Hess*, 63 Sup. Ct. Rep. 379, 317 U.S. 537, the Court, in analyzing the False Claims Act, stated at page 384:

"These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government."

Fraud within the meaning of the False Claims Act was defined in *United States v. Farina*, 153 F. Supp. 819 (D. N.J. 1957) at page 822, as follows:

"In addition, no facts have been alleged by the Government indicating fraud, within the meaning of the statute, in connection with making a claim against the United States. 'Fraud consists in the false representation of a material fact, made with knowledge of its falsity and with the intent to deceive the other party, which representation must be believed and acted upon by the party deceived to his damage.' *Cahill v. Curtiss-Wright Corporation*, 57 F. Supp. 616."

In showing that the Statute intended that the fraud result in damage before there could be a violation of the Statute, the case of *Hyslop v. United States*, 261 F.2d 786 (8th Cir. 1958), at page 792, stated:

"There is no evidence even tending to prove that the government accepted the eggs or in any manner became liable to pay any claim based thereon, nor is there any claim in the motion for summary judgment that the government suffered any damage by reason of the transaction. This provision of the statute is penal and must be strictly construed."

Judge Mishler, of the Eastern District of New York, in *United States v. Fowler*, 282 F. Supp. 1 (E.D.N.Y. 1968), stated as follows:

"Though there is language in some of the cases to the effect that the False Claims Act was not designed to reach every kind of fraud practiced on the Government, see, *United States v. McNinch*, 356 U.S. 595, 599, 78 S. Ct. 950, 953, 2 L.Ed.2d 1001 (1958), the debates at the time of the Act's original enactment in 1863 suggest that it was intended to reach all types of fraud, without

qualification, that result in financial loss to the Government. *United States v. Neifert-White Co.*, 390 U.S. 228, 88 S. Ct. 959, 19 L.Ed.2d 1061, March 5, 1968." (Emphasis supplied.)

In *Woodbury v. United States*, 232 F. Supp. 49 (D. Oregon 1964), at page 55, the Court stated:

"The mere showing that a person has signed a false or incorrect statement and presented it for payment is not, in itself, sufficient to hold such person liable under the False Claims statute. The Government must go beyond that and show that the person intended that the signing would procure from the Government something to which the person knew he was not entitled. Proof must be had that such person intended, as a result of the signing of the statements, to defraud the Government."

In *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963), the Court confirmed that the False Claims Act was not designed to reach every kind of fraud practiced on the government. The Court then went on to say:

"But the manner in which the fraud occurs is controlling in bringing the False Claims Act into play. To do that, there must be more than mere fraud; the fraud must be predicated on a claim."

In the case at bar, the thrust of the plaintiff's claim is that the forged endorsement of the Government check constituted a claim against the United States. The cases have indicated that the essence of the False Claims Act was the making of a false and fraudulent claim. It is respectfully submitted that, in view of the fact that payment was made

by the Government by a valid check, it could not thereafter be converted into a false claim simply by reason of the forged endorsement. This is not the type of fraud designed to come within the ambit of the Act.

In *United States v. Cochran*, 235 F.2d 131 (5th Cir. 1956), the United States sought to recover from the defendant \$12,000.00 for causing to be presented for approval to the Federal Housing Administration six claims, knowing such claims to be false, fictitious or fraudulent. The United States claimed that §231 was a sort of catch-all statute announcing and containing a general declaration of principle against fraud and overreaching. The United States sought to persuade the Court that the only proof required was that the defendant had acted badly against the United States. The Court went on to state:

"Chafing at the uniform construction of the statute, the United States in effect insists that the statute in fact and in law applies here where neither money nor property was claimed from or against the United States. It does this on the theory that the defendant, in applying to the banks for credit on an F.H.A. loan form, *made a claim upon the government for the extension of its credit in support of the loans applied for, the government was cheated, and this was in effect a false claim upon which the United States was fraudulently induced to part with money or property.* (emphasis by the Court)

It goes without saying that the acts of the defendant were criminal and that he was correctly prosecuted and convicted under the applicable statute, Section 1010, Title 18 U.S.C. for making false statements in connection with procuring the loan from the bank. It

is quite another thing, however, to say that, because he was so guilty, he was subject to the penalties provided in Section 231. Section 1010 does not so provide. It specifically denounces as an offense the making 'for the purpose of obtaining any loan or advance of credit from any * * * or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance * * * any statement, knowing the same to be false,' and under this statute, which plainly dealt with and plainly denounced his actions as an offense, defendant was correctly prosecuted and convicted.

What the government is in effect doing here is reading into Section 231, the language of Section 1010, or, putting it differently, reading Section 231 as though it contained the same or similar language to Section 1010, whereas, as plainly appears in note 1, *supra*, nowhere in it is there any language having such purport or effect. Every word and line of this statute breathes the purpose to deal, it has the effect of dealing, only with the acts of persons falsely claiming money or property in the circumstances and with the effect dealt with in the statute. *The statute does not deal with or denounce fraud in general. It cannot be read as doing so.*" (emphasis supplied)

CONCLUSION

The judgment appealed from should be reversed, the order of Judge Bartels should be vacated, defendant's motion for summary judgment should be granted and the plaintiff's motion for summary judgment should be denied.

Dated: New York, New York
February 10, 1975

Respectfully submitted,

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